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In The

Supreme Court of the United States

October Term, 1973

No. 73-1051

ANTHONY BRIGANDI and DONALD BRIGANDI,

Petitioners,

vs.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT

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ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK SUPREME COURT, APPELLATE DIVISION, FIRST DEPAREMENT

STATEMENT

The petitioners, Anthony Brigandi and Donald Brigandi, respectfully petition this Court to grant a writ of certiorari to the Appellate Division of the Supreme Court of the State of New York, First Department, to review a determination of one of the justices thereof denying an application for leave to appeal from an order of the Supreme Court, New York County, (Honorable Harold Baer, J.) denying an application in the nature of a writ of error coram nobis seeking to reduce sentence or to vacate the judgment of conviction on the grounds that the sentence was inappropriate because it was apparently based upon misleading and inflammatory information for which there was no predicate or proof.

Statement

The Appellate Division, First Department, denied leave to appeal on the 1st day of November, 1973.

The defendants were respectively convicted after trial in the New York Supreme Court, County of New York, for possession of stolen property in the first degree (New York Penal Law, Section 165.50).

The defendant-petitioner, Anthony Brigandi, is presently incarcerated, serving a sentence up to 3 years imprisonment. The petitioner, Donald Brigandi, was given a suspended sentence.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3). The order of the Appellate Division, First Department, denying leave to appeal from an order of the Supreme Court, New York County, denying a writ of error coram nobis and motion to vacate sentence, without a hearing, was rendered on the 1st day of November, 1973. A copy of the order denying leave to appeal is annexed hereto and made a part hereof. Under New York procedure, it is not permissible to appeal further once leave to appeal is denied. Therefore, state remedies have been exhausted.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment of the United States Constitution is involved herein, as is the Fifth and Sixth Amendments of that same Constitution. In addition, Article One, Section 9 of the United States Constitution is also germane.

QUESTIONS PRESENTED

1. Whether a defendant may be incarcerated for a period of time, perhaps longer than the Court would ordinarily have imposed, because of unsubstantiated and unfounded allegations contained in reports by the prosecutor or in probation reports?

2. Whether the Constitutional rights under the Fourteenth Amendment were violated when petitioner Anthony Brigandi was incarcerated beyond a period of 1 year by virtue of inflammatory and unproved allegations uttered by the prosecutor, in the face of an expression by the trial court that it ordinarily would have preferred to have sentenced petitioner to only 1 year imprisonment?

3. May a defendant in a criminal case be punished by additional incarceration for exercising his right to go to trial, instead of pleading guilty?

4. Whether petitioner, a disabled American veteran, never before convicted of any crime, should have been incarcerated for 3 years when promises were made to him that if he pleaded guilty he would receive no sentence and the charges against his son, co-petitioner, Donald Brigandi, would be dismissed?

5. Whether as a matter of Constitutional right, a person being sentenced has the right to be confronted with allegations contained in pre-sentence or probation reports or in statements uttered by the prosecutor which may affect the length of incarceration?

THE FACTUAL BACKGROUND

The defendant-petitioner, Anthony Brigandi, had been sentenced to up to 3 years imprisonment by Justice Harold Baer of the Supreme Court, New York County. Prior to the execution of that sentence, however, a motion was made before Justice Baer to reduce in view of the fact that not only had promises been made prior to conviction that if defendants-petitioners pleaded guilty, Anthony Brigandi would receive a suspended or probationary sentence and the charges against Donald Brigandi would be dismissed, but, in addition there was no reason to believe that petitioner Anthony Brigandi should be incarcerated beyond a year.

As a matter of fact, on June 20, 1973, the Court, per Justice Baer, declared on the record that he was disposed to reduce the sentence to 1 year. The prosecutor, however, objected to this and referred to completely unsubstantiated and hearsay condemnations which precluded any confrontation by the petitioners.

As a result of this, Justice Baer decided not to reduce sentence and let the sentence stand.

Supporting affidavits which were submitted in the Court at the trial level substantiated petitioners' claims. The trial attorney, Joseph P. Klempner, Esq., stated in a statement, that if defendants-petitioners had pleaded guilty, the Court promised it would have directed acquittal of Donald Brigandi, and would have only fined Anthony Brigandi.

The trial court therefore, although of the opinion that the sentence was too harsh, did not reduce it because of the opposition of the prosecution which consisted of completely hearsay and unsubstantiated allegations.

ARGUMENT

POINT I

THE PETITIONERS WERE DENIED DUE PROCESS OF LAW BY THE USE BY THE PROSECUTOR OF HEARSAY AND UNSUBSTANTIATED ALLEGATIONS OF ALLEGED IMPROPRIETIES AND CRIMINALITY AGAINST WHICH NO OPPORTUNITY OF CONFRONTATION WAS PERMITTED, THUS RESULTING IN GREATER PUNISHMENT THAN THE COURT WOULD ORDINARILY HAVE IMPOSED, MOREOVER, THE COURT DID NOT EVEN PERMIT PETITIONERS TO MAKE ANY STATEMENT OF REFUTATION OF THE CHARGES.

It is submitted that a person who is incarcerated longer than he ordinarily would have been because of unfounded and unsubstantiated hearsay statements made by the prosecution, against which he is given no opportunity of confrontation or refutation, then such a person has been denied due process of law because he has been deprived of liberty in violation of the Constitution and without a judicial trial (Art. I, Sec. 9, U.S. Constitution)*.

The Supreme Court of the United States has declared in *Harris v. United States*, 382 U.S. 162, 166:

> "Fair administration of justice demands that the sentencing judge will not act on surmise, misinformation, and suspicion but will impose sentence with insight and understanding."

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* The incarceration without trial is a bill of pains and penalties under the prohibition against bills of attainder (Art. I, Sec. 9, U.S. Constitution).

Argument

Where presentence information is publicly disclosed, as it was in the case at bar, the defendant must be given a "full opportunity to respond". (*United States v. Virga*, 426 F.2d 1320, 1323 (2 Cir. 1970); *United States v. Holder*, 412 F.2d 212 (2 Cir. 1969); *Baker v. United States*, 388 F.2d 931 (4th Cir. 1968); *United States v. Carden*, 428 F.2d 1116, 1117 (8th Cir. 1970); *King v. United States*, 410 F.2d 1127 (9th Cir. 1969); and *United States v. Queen*, 435 F.2d 66 (D.C. Cir. 1970)).

It should also be noted that in this case it was the prosecutor's office, rather than the impartial probation department, which publicized the adverse charges against Anthony Brigandi in open court. This renders them doubly unfair and requires an opportunity to rebut these unfounded allegations. (*United States v. Solomon*, 422 F.2d 1110 (7th Cir. 1970); *Haller v. Robbins*, 409 F.2d 857 (1st Cir. 1969); and *United States v. Hone*, 456 F.2d 495 (6th Cir. 1972)).

Haller's sentence took place without affording him "an ample opportunity to present his version" (id. at 859). The Court, holding that the defendant was entitled to a hearing as to the truth of the hearsay report, emphasized that the report in question was not the product of a "professional neutral . . . such as a probation officer".

The Court finally noted that " . . .however impartial a prosecutor may mean to be, he is an advocate, accustomed to stating only one side of the case". (Id.)

Finally, in *United States v. Solomon*, *supra*, the Court explained quite aptly, 422 F.2d at 1121:

Argument

> "The report in this case was prepared and presented by the prosecutor, not by an independent probation officer at the request of the judge. Under Rule 32(c)(2) of the Federal Rules of Criminal Procedure, the discretionary power of the trial judge to determine the extent and manner of disclosure of the probation officer's pre-sentence report is not unfettered (see *Baker v. United States*, 388 F.2d 931, 933-934 (4th Cir. 1968)) and should be liberally applied. *United States v. Fischer*, 381 F.2d 509 (2d Cir. 1967), certiorari denied, 390 U.S. 973 . . .; see generally 8A Moore, Federal Practice, 32.03[4](1969). Moreover, in the present case, the prosecutor's adversary position in the criminal proceedings, inevitably raising doubts concerning his complete impartiality and accuracy, distinguishes the treatment of prosecutorial reports from those supplied by 'professional neutrals such as a probation officer. *Haller v. Robbins*, 409 F.2d 857, 859 (1st Cir. 1969)' 422 F.2d supra at 1120-1121."

The point of the distinction is clear; the defendant's need for a realistic opportunity to correct mistakes is greater when the sentencing judge relies on prosecutorial reports than when he relies on reports prepared by the probation department. Because of his adversarial position, there is a high "risk that the prosecutor might supply incorrect . . . information", hence fostering "a possibility that defendant's rights will not be adequately protected" if the defendant does not have an *adequate* opportunity to correct the information. *United States v. Hone*, 456 F.2d *supra*, at 496-497.

Argument

The following is an excerpt of a portion of the minutes of the proceedings before this Court on June 20, 1973. At page 6 thereof, the District Attorney himself indicated that the defendant Anthony Brigandi was definitely being penalized for having exercised his right to stand trial and for having refused to accept a plea of guilty:

> " . . .You then finished by stating: 'Judge Ringel, he had his opportunity. He had his opportunity. And he's recalcitrant. I have no doubt of his guilt. *He had the opportunity before and during trial not only for consideration for himself, but to leave his son out of the picture entirely. He had his opportunity and he didn't take it, and he has to suffer the consequences.* The jury found him guilty.' "

In essence, therefore, petitioner was punished for not agreeing to plead guilty.

At pages 9 and 10 of the record, the District Attorney uttered inflammatory remarks about Anthony Brigandi, of which the defendant vehemently denies the truth, linking him with major criminals and organized crime. This could not help but have inflamed the Court against the defendant:

> " . . . On May 2nd, 1973 Captain Thomas Kasane of the New York City Police Department appeared before that committee — and I was present, your Honor — and stated that Anthony Brigandi, or the Brigandis, were involved in receiving stolen property from what were known as the Pressure

Vault Gang. The Pressure Vault Gang were a group of criminals who specialized in stealing large gem deposits on the east side.

Mr. Brigandi was implicated as one of the persons. Corroboration was not obtained. An indictment was not obtained at that time.

In addition, your Honor — in addition — the defendant was alleged to have been involved in this receiving scheme with one person known as Jack Mace, also known as Jack Melish, who has been identified as the chief receiver of stolen property in the United States for organized crime.

As has been stated by most of the authorities on organized crime, Mr. Brigandi, or Mr. Mace, may not be the usual character or stereotype of organized crime people, but they act as the conduit for organized criminal elements."

It should be noted that no right of confrontation has ever been granted with respect to the foregoing allegations and no factual predicate, other than hearsay, is offered for their accuracy. Yet Anthony Brigandi got two additional years in jail because of the remarks!

At pages 11 and 12, this Court stated that it had been inclined to consider a reduction in sentence. The following colloquy indicates this fact:

"THE COURT: We're not finding fault with your procedure.

The point is that when you advised me by letter, I said I would be inclined to consider a reduction, but provided you advise the district attorney —

MR. ANOLIK: Which I did, your Honor.

THE COURT: —and there was not substantial opposition. Obviously there is substantial opposition.

The sentence, as I recall, was not exactly as Mr. Snitow stated, but was zero to a maximum of three on each of the three counts, to be served concurrently, and a fine of two thousand dollars.

And the only thing that you're here for today is to try to reduce that incarceration.

MR. ANOLIK: Yes, your Honor.

THE COURT: And, frankly, under the circumstances, I don't see how I can do it.

If there wasn't great opposition, and because of age, family and health, I might have considered it."

The defendant Anthony Brigandi was charged in open court with serious criminal activities, for which he has never been indicted and to which he has never been given an opportunity to respond.

Argument

The cases cited *supra* indicate that when public disclosures of such matters are made, an accused has the right to respond.

At page 16 of the record the following colloquy indicates that the Court, despite its desire to be fair and just, was obviously overwhelmed by what the prosecutor had declared and did not permit the defendant to utter one word in his own behalf:

> "MR. ANOLIK: Your Honor, may the defendant say one word to the Court?
>
> THE COURT: No. There's no use in doing that.
>
> I am not going to reduce the sentence under the circumstances."

The error of the Court in not even permitting the petitioner to make a statement in his own defense following this hearsay and unsubstantiated charges, clearly deprived him of an opportunity to be heard and, accordingly, was a gross violation of the Fifth and Fourteenth Amendments of the United States Constitution.

We ask this Court to grant certiorari so that this denial of due process may be rectified.

In *Harris v. United States*, *supra*, this Court is understandably gravely concerned over the imposition of additional punishment because of uncharged and unsubstantiated allegations of impropriety and criminality.

Argument

A person should be sentenced for the crime of which he was convicted and nothing else.

CONCLUSION

The petition for certiorari should be granted.

IRVING ANOLIK
Attorney for Petitioners

CERTIFICATE DENYING LEAVE

STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

BEFORE: HON. LOUIS J. CAPOZZOLI,

Justice.

The People of the State of New York,

-against-

Anthony Brigandi and Donald Brigandi,

Defendants.

I, LOUIS J. CAPOZZOLI, a Justice of the Appellate Division, First Department, do hereby certify that, upon application timely made by the above-named defendant (by notice of appeal) for a certificate pursuant to Section 460.15 of the Criminal Procedure Law, and upon the record and proceedings herein, there is no question of law or fact presented which ought to be reviewed by the Appellate Division, First Department and permission to appeal from the order of the Supreme Court, New York County, entered on October 5, 1973 is hereby denied.

Dated at New York, New York
November 1, 1973.

Louis J. Capozzoli
Justice

OPINION

SUPREME COURT : NEW YORK COUNTY
TRIAL TERM : PART XXX

THE PEOPLE OF THE STATE OF NEW YORK,

-against-

ANTHONY BRIGANDI and DONALD BRIGANDI,

Defendants.

HAROLD BAER, J.:

This is an application to resentence this defendant and upon resentence to vacate the concurrent indeterminate sentences of a maximum of three years' incarceration, and to sentence the defendant to probation.

This defendant was convicted of Criminal Possession of Stolen Property. His conviction was affirmed by the Appellate Division (41 A D 2d 601) and the Court of Appeals (32 N Y 2d 908).

Prior to trial the defendant was given the opportunity to plead guilty. He adamantly declared his innocence which was his right. He had a long and full and fair trial. The jury found him guilty. His son, also found guilty, was given probation. This defendant was sentenced to a maximum of three years. After conviction this court never considered any sentence other than incarceration. The Assistant District Attorney recommended a prison

sentence but in no way did his recommendation influence the court not to give probation as there was no thought of doing so.

This defendant may not have a criminal record but he knowingly purchased stolen property and influenced others to steal the property. His recalcitrant conduct before and after his conviction beyond a reasonable doubt, convinced this court that he learned nothing from this experience; that there was no showing that his conduct would change or that he saw anything wrong in what he did. It was only because of his background and age that the very lenient sentence was imposed.

The application is, in all respects, denied.

Dated: October 1973.

J.S.C.